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Plaintiff Zoya Kovalenko

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

1 Plaintiff hereby opposes and respectfully requests this Court deny Defendant Kirkland &
 2 Ellis LLP (“**Defendant**”)’s Motion to Redact (Dkt. No. 16) Plaintiff’s Complaint (Dkt. No. 1).

3 **STATEMENT OF FACTS**

4 Defendant filed its Motion after the close of business on Wednesday, November 23, 2022,
 5 around six weeks after Plaintiff filed her Complaint and after Defendant issued statements to the
 6 press on October 12, 2022 regarding Plaintiff’s Complaint.

7 **ARGUMENT**

8 This Court should dismiss Defendant’s Motion in its entirety because it is without merit
 9 for the reasons detailed below.

10 **I. Defendant Fails to Show Compelling Reasons for Its Requested Redactions**

11 This Court should deny the Motion because Defendant fails to show compelling reasons
 12 for its requested redactions. “Under the Ninth Circuit’s jurisprudence in *Kamakana [v. City and*
County of Honolulu, 447 F.3d 1172 (9th Cir. 2006)], a request to seal all or part of a complaint

13 must clearly meet the ‘compelling reasons’ standard and not the ‘good cause’ standard.” *In re*
 14 *NVIDIA Corp. Derivative Litig.*, No. C 06-06110 SBA, Dkt. No. 125, at *5 (N.D. Cal. Apr. 22,
 15 2008). “[T]he proponent of sealing bears the burden with respect to sealing” and “[a] failure to
 16 meet that burden means that the default posture of public access prevails.” *Kamakana*, 447 F.3d
 17 at 1182. “To seal portions of the complaint[]—the document[] that [is] the heart of this, and
 18 every, lawsuit”—Defendant is “required to ‘articulate compelling reasons supported by specific
 19 factual findings’ to outweigh the presumption of public access. *See In re Google Play Store*
 20 *Antitrust Litig.*, 556 F. Supp. 3d 1106, 1107 (N.D. Cal. 2021) (quotation omitted).

22 Defendant contends based on an inapposite, non-controlling decision that the “good-
 23 cause” standard applies to information it contends is attorney-client privileged. Mot. 3.¹ This

25 ¹ Defendant unpersuasively cites a case applying the good-cause standard in ruling on a motion
 26 to seal a declaration with privileged information related to a discovery motion because the
 27 declaration was “only tangentially related to the merits of the case.” *Harrington v. Tackett*, No.
 28 18-CV-00028, 2019 WL 2778106, at *5 (D. Nev. July 2, 2019). In contrast, this Court has stated
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1 Court should dismiss the Motion as to the redactions Defendant claims are attorney-client
 2 privileged because Defendant fails to show compelling reasons warrant redaction. *NVIDIA*, No.
 3 C 06-06110 SBA, at *1 (denying motion to seal complaint that applied “good cause” standard
 4 because “the applicable standard for sealing all or part of a complaint is the ‘compelling reason’
 5 standard”); *see also Kamakana*, 447 F.3d at 1180 (“A ‘good cause’ showing will not, without
 6 more, satisfy a ‘compelling reasons’ test.”). Defendant’s *ipse dixit* conjecture that privileged
 7 information would meet the compelling-reasons standard is insufficient to meet its burden. *See*
 8 *Kamakana*, 447 F.3d at 1182 (“When sealing documents attached to a dispositive pleading, a
 9 district court must ‘base its decision on a compelling reason and articulate the factual basis for
 10 its ruling, without relying on hypothesis or conjecture.’” (citation omitted)).

11 Defendant also fails to meet its burden to demonstrate a compelling reason for restricting
 12 the public’s right to access the remainder of the information it seeks to redact. Defendant “must
 13 make a ‘particularized showing’” of compelling reasons with respect to each redaction. *See, e.g.,*
 14 *Rieckborn v. Velti PLC*, No. 13-cv-03889-WHO, at *2 (N.D. Cal. Oct. 3, 2014) (citing *Foltz v.*
 15 *State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1138 (9th Cir. 2003)). “‘Tepid and general
 16 justifications’ are not enough to support the showing of ‘specific prejudice or harm’ required to
 17 justify sealing.” *Id.* (quotation omitted). Defendant “seeks to seal the remainder of information
 18 [alleged attorney-work product, alleged confidential information, and home addresses] under the
 19 compelling reason standard,” Mot. 3, yet fails to “make a ‘particularized showing’” of compelling
 20 reasons with respect to the redactions. *See Rieckborn*, No. 13-cv-03889-WHO, at *2; Mot. 4–5.

21 **II. Defendant Fails to Establish Its Proposed Redactions Contain Attorney-Client**
Privileged and/or Protected Attorney-Work Product Information

22 This Court should deny the Motion because Defendant fails to establish its proposed
 23 redactions contain attorney-client privileged and/or protected attorney-work product
 24 information. For information that a party moves to seal, the party bears the burden of proving
 25 the information it claims is privileged meets all eight elements of the following test: “(1) Where

27 to the merits of the case”” (citation omitted)).
 28

1 legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such,
 2 (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are
 3 at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8)
 4 unless the protection be waived.” *See United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010)).
 5 Here, Defendant broadly proclaims that all proposed redactions for 34 paragraphs and three
 6 footnotes is “protected by the attorney-client privilege/attorney work product privilege because
 7 the information refers to and contains communications to and from various Firm clients, and
 8 legal analysis and legal advice provided to various Firm clients prepared in anticipation of
 9 litigation.”² Powell Decl. ¶¶ 5–6. The Court should deny the Motion because Defendant’s
 10 generic statement is insufficient and does not satisfy its burden to establish privilege applies.

11 **III. Defendant Fails to Demonstrate Legally Sufficient Reasons for Redaction**

12 Defendant fails to satisfy its burden to show information should be redacted based on the
 13 standard it has applied under Civil Local Rule 79-5(c).

14 **A. Defendant Fails to Articulate Adequate Reasons Warranting Redaction**

15 Defendant “had an ample opportunity to demonstrate a compelling reason for sealing,
 16 and squandered it.” *See Google*, 556 F. Supp. 3d at 1107. At best, Defendant “presented nothing
 17 but generic and boilerplate statements for its sealing requests.” *See id.*; Mot. 2, 4–5; *see also*
 18 Powell Decl. ¶ 5. Defendant cites generic principles and relies on conclusory, all-encompassing,
 19 and generic allegations, which are inadequate to override the presumption of public accessibility
 20 of the Complaint. Mot. 4–5.

21 **B. Defendant Provides Insufficient Assertions of Harm to Demonstrate Injury**

22 Defendant makes the conclusory assertion that injury resulting from disclosure of
 23 purported privileged/protected information is “self evident” and that injury would also accrue if
 24 “client identifying information, fee information,” “billing rate information,” and “confidential
 25 personnel information” is not redacted based on a generic assertion of potential competitive harm.

26
 27 ² Plaintiff categorically disputes that any of the information identified for redaction contains
 28 client communications or legal analysis and legal advice provided to Defendant’s clients.
 Defendant proffers nothing to support such claims. *See generally id.*; Mot.

1 Mot. 5; Powell Decl. ¶¶ 7, 9, 10. However, “[b]road allegations of harm, unsubstantiated by
 2 specific examples or articulated reasoning,” are “insufficient.” *Id.* (quoting *Beckman Indus.,*
 3 *Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992)); *accord* Standing Order for Civil Cases
 4 Before District Judge Haywood S. Gilliam, Jr. ¶ 30 (N.D. Cal. Jan. 4, 2022) (“Generic and vague
 5 references to ‘competitive harm’ are almost always insufficient justification for sealing.”).
 6 Defendant’s conclusory assertion—based exclusively on the Powell Declaration—that “keeping
 7 such information confidential” gives it a “competitive advantage” is analogous to generic
 8 assertions of competitive harm that this Court has found to be insufficient to demonstrate injury.
 9 *Google*, 556 F. Supp. 3d at 1107–08 (finding insufficient Google’s “declaration by a ‘Senior
 10 Legal Project Manager’” stating disclosure of “non-public information” could, “[i]f revealed to
 11 competitors and potential business counterparties, . . . disadvantage Google in marketing and in
 12 negotiations.”). Here, as in *Google*, Defendant “made no showing whatsoever that might have
 13 favored keeping portions of the complaint[] secret, and its ‘failure to meet that burden means that
 14 the default posture of public access prevails.’” *Id.* at 1108 (citation omitted). Accordingly, this
 15 Court should deny Defendant’s Motion. *See id.*

16 C. The Motion Does Not Address Insufficiency of Less Restrictive Alternatives

17 Defendant simply states it could but chose not to seek a more restrictive alternative (i.e.,
 18 sealing the entire Complaint). Mot. 5. However, saying it did not take the most restrictive
 19 approach does not address whether a less restrictive alternative would be sufficient.

20 IV. Defendant’s Proposed Redactions Are Inconsistent and Unprincipled

21 Defendant’s proposed redactions are inconsistent and unprincipled, demonstrating the
 22 arbitrary and specious nature of its proposed redactions. For example, Defendant proposes
 23 redacting basic factual information e.g., “patent assertion analysis,” “infringement charting on
 24 the target Defendant’s products,” “[target-defendant] chart” (alteration in original, Complaint ¶
 25 81), “infringement charting,” “to litigate with an alternative-fee arrangement (namely, with
 26 litigation funding).” Powell Decl. Ex. B ¶¶ 81, 83, 85. Conversely, in another paragraph in the
 27 Complaint, Defendant only proposes redacting “subsidiary of large client” but does not propose
 28 redacting basic factual information almost identical to the aforementioned redactions, e.g., that
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1 Plaintiff conducted “pre-suit investigation and analysis for another litigation-funded case,”
 2 “analyzed and assessed numerous patents’ potential infringement reads across a range of target
 3 potential defendants and products . . . and assessed the strength of the patents with the strongest
 4 infringement reads,” or that Plaintiff “drafted infringement charts.” Powell Decl. Ex. B ¶ 150.
 5 This is but one of myriad examples of Defendant’s unprincipled and haphazard approach to its
 6 proposed redactions. The four corners of the Motion and its accompanying exhibits provide no
 7 rationale for the contradictory and differential treatment of analogous information throughout
 8 with respect to redactions.

9 **V. Defendant Incorrectly and Improperly Styles Its Motion As Administrative**

10 Moving for administrative relief is improper when the matter is “otherwise governed by
 11 a federal statute, Federal Rule, local rule, or standing order of the assigned Judge.” Civil L.R. 7-
 12 11. Defendant’s Motion falls outside the purview of the Civil Local Rule governing
 13 administrative motions given that the request to redact is “otherwise governed by a . . . Federal
 14 Rule.” *Id.* At least one Federal Rule governs the Motion. Fed. R. Civ. P. 5.2 (governing
 15 redactions and allowing court issuance of protective orders requiring same or limitation of “a
 16 nonparty’s remote electronic access to a document filed with the court”). Additionally, the plain
 17 language of Civil Local Rule 7-11 does not cover motions to redact an opposing party’s already
 18 filed pleading (e.g., a Complaint). *Id.* (listing “motions to file documents under seal” as example
 19 of administrative motion). Similarly, Civil Local Rule 79-5 includes only two scenarios in which
 20 a motion to seal is properly styled as administrative: (1) “[a] motion to seal a party’s own
 21 document”; and (2) “[a] motion to seal . . . a document designated as confidential by another
 22 party.” *Id.* 79-5(c), (f). Neither motion is at issue here. Instead, Defendant moves to redact
 23 information in Plaintiff’s already-filed Complaint without prior confidentiality designation.³

24 **CONCLUSION**

25 For the reasons above, this Court should deny Defendant’s Motion to redact.

26
 27 ³ Plaintiff timely opposes Defendant’s Motion within two weeks of its filing. See Civil L.R. 7-
 28 3(a).

1 Respectfully submitted this 1st day of December, 2022.

2 By: /s/ Zoya V. Kovalenko
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the United States of America that: (1) counsel representing Defendant Kirkland & Ellis LLP (“**Kirkland**”) is being served with a copy of the foregoing document via ECF; and (2) counsel representing each of Kirkland’s co-Defendants is being served with a copy of the foregoing document via email (Lynne Hermle, lchermle@orrick.com; Joseph Liburt, jliburt@orrick.com) on December 1, 2022.

/s/ Zoya Kovalenko

Zoya Kovalenko